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March 17, 2003

VIA ELECTRONIC FILING

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TWB-204
Washington, DC 20554

Re: Ex parte, CC Docket No. 02-33, Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities ("Wireline Broadband")

CC Docket Nos. 01-338, 96-98, 98-147, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996

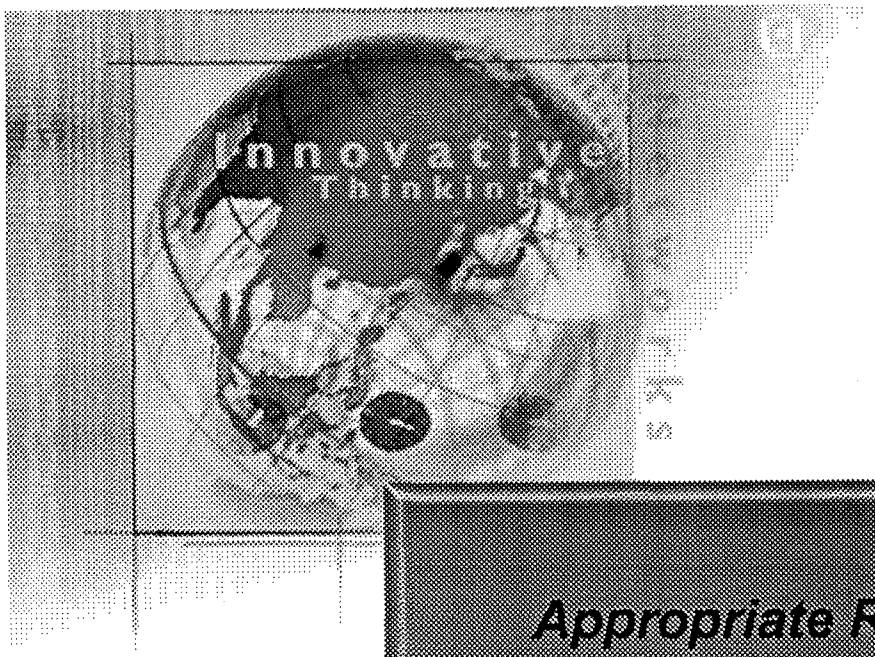
Dear Ms. Dortch:

On Friday, March 14, 2003, Robert Quinn, Government Affairs Vice President-AT&T, Steve Garavito, General Attorney-AT&T, David Lawson, Sidley Austin Brown & Wood and the undersigned met with Carol Mattey, Brent Olson, Cathy Carpino, Michael Carowitz, Christian Wojnor, Teri Natoli, Gail Cohen and William Kehoe of the Wireline Competition Bureau, and Harry Wingo of the Office of the General Counsel. The purpose of the meeting was to review AT&T's position in the Wireline Broadband proceeding in light of the Commission's February 20, 2003 action in the triennial UNE review. The attached outline was used to facilitate our discussion.

One electronic copy of this Notice is being submitted to the Secretary of the FCC in accordance with Section 1.1206 *et. seq.* of the Commission's rules.

Sincerely,

cc: M. Carowitz
C. Carpino
G. Cohen
W. Kehoe
J. Miller
T. Natoli
B. Olson
H. Wingo
C. Wojnor



Appropriate Regulatory Treatment Of Wireline Broadband Facilities And Services

March 14, 2003

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The Core *Computer Inquiries* Obligations

- The Bells must offer transport to enhanced services providers on an "unbundled" basis.
- The Bells must tariff this basic transport service.
- The Bells must offer basic transport service on the same terms and conditions they provide such service to their own enhanced services operations.

The *Computer Inquiries* Rules Have Always Been Animated By Market Power Concerns

- Absent unbundling requirements, a Bell could deny access to bottleneck facilities, "force prices to a supranormal level," and force enhanced services "competitors . . . to leave the market." *Computer II* ¶ 208.
- "[In *Computer II*], we were concerned with the potential for anticompetitive conduct that could result from [Bell] participation in unregulated markets. We were particular concerned that [the Bell System] could use [its] control over basic services to discriminate against others' competitive services and products. We were also concerned that these carriers could misallocate costs from unregulated to regulated activities, allowing them to impose unfair regulatory burdens on regulated ratepayers and improperly cross-subsidize their competitive offerings." *Computer III* ¶ 12.
- In *Computer Inquiries* proceedings, the Commission "found" that "the Bell Operating Companies . . . have sufficient market power on a national scale to engage in anticompetitive activity . . . ." *2001 Bundling Order* ¶ 4.

The Courts Have Invalidated Attempts By The Commission To Relax Core *Computer Inquiries* Rules

- In *California I*, the Court rejected the Commission's argument that the structural separation requirement should be eliminated on the basis of technological advances and increased competition in enhanced services markets, and stressed that regulation would be necessary until ISPs could "bypass" the Bells' "bottleneck" last mile facilities. 905 F.2d 1217, 1234-35 (9th Cir. 1990).
- In *California III*, the Court again rejected the Commission's arguments that structural separation should be eliminated, finding that the Commission's "cost-benefit" determination did not adequately account for the fact that the Bells "have the incentive to discriminate and the ability to exploit their monopoly control over local networks." 39 F.3d 919, 929-30 (9th Cir. 1994).
- Nearly a decade has passed without a response to the 9th Circuit's remand; ignoring the overwhelming evidence of market power yet again could only lead to "strike three."

It Is Still Largely A "One Wire" World For ISPs And Other Enhanced Services Providers

- Cable companies have granted access to only a few ISPs and only in selected markets.
- Many cable companies provide no ISPs access to their systems and there have been no recent announcements of ISP carriage arrangements.
- Although there has been much hype about future satellite, WiFi and "powerline" alternatives for ISPs, none is a serious bypass alternative today or will be in the near term.

Even If ISPs Had Access To Cable Modem-Capable Wires, Cable Wires Do Not Serve All Residential Customers

- In some residential areas, cable service is not available to anyone. *Third Section 706 Report*, App. C.
- Only 58% of zip codes in the U.S. potentially have access to multiple broadband providers (which include CLECs leasing Bell loops). *Id.* ¶ 29.
- As California observed in this proceeding, "[f]orty-five percent of Californians that live in cities with broadband service have DSL service as their only broadband option." California Comments at 28.

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Even If ISPs Had Access To Cable Modem-Capable Wires, Cable Wires Do Not Serve Most Business Customers

- Even Verizon concedes that cable passes at most only 2.5 million of the 10.5 million (24%) of small and medium business. *See* 1/15/03 Verizon Ex Parte at 3.
- For small businesses of fewer than 100 employees, DSL accounts for more than 70% of commercial grade service. In Stat/MDR, *Small Business Broadband Report* (Oct. 2002).
- For medium-sized businesses with 100 to 999 employees, DSL serves 55 times the number of subscribers served by cable in main offices (a 98% share) and 12 times the number for branch offices (a 92% share). InStat/MDR, *The Data Nation: Demand for Broadband and Data Services in the Middle Market* (Oct. 2002).
- The Bells charge up to five times more for business services than for residential services. 12/23/02 AT&T Ex Parte at 7 n.18.

The Triennial Review Decision Further Weakens The Case For Elimination Of Core *Computer Inquiries* Obligations

- In theory, *Intra*modal competition fostered by cost-based access to Bell facilities could potentially constrain Bell market power over ISPs.
- In theory (at least prior to the Triennial Review decision), CLECs using leased Bell loops with their own electronics could offer ISPs last mile bypass alternatives.
- Even before the Triennial Review decision, however, existing limitations and anticompetitive Bell conduct weakened intramodal broadband competition.
- Given the onerous new "broadband" restrictions apparently imposed in the Triennial Review proceeding, intramodal competition cannot now be considered a serious competitive constraint on Bell market power.

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No Across-The-Board Elimination Of *Computer Inquiries* Obligations Is Possible On This Record

- Where, as here, the relevant markets are local, a granular analysis of market power is required. *See* BellSouth ILEC Dominance Reply Comments, Harris Dec. ¶ 6 (Apr. 22, 2002) ("[T]he geographic scope of the market for broadband access is local.")
- Broadband deployment "is not uniform across the nation." *Second Section 706 Report* ¶ 1.
- The Bells have made no attempt to demonstrate the presence of effective -- *i.e.*, price constraining -- alternatives in any relevant local market.
- In some markets the Bells have a broadband *monopoly* at retail and wholesale -- across-the-board elimination of the *Computer Inquiries* unbundling and nondiscrimination requirements could not be justified under even the most jaded analysis.

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Even Where ISPs Have Access To Both Wireline And Cable Wires, This Duopoly Competition Is Insufficient

- "The existence of only two firms in an industry does not satisfy the general economic definition of pure competition, which requires the existence of many firms, no one of which has a significant influence on the market price." *International Detective Services Inc. v. ICC*, 613 F.2d 1067, 1075 n. 18 (D.C. Cir. 1979) (citing economics authorities).

- Eliminating unbundling where there is only one alternative to the incumbent would create "stagnant duopolies" that would defeat the Act's objective of "creat[ing] competition among multiple providers . . . that would drive down prices to competitive levels." *UNE Remand Order* ¶ 55.

- "[E]xisting antitrust doctrine suggests that a merger to duopoly or monopoly faces a strong presumption of illegality." *See EchoStar-DirecTV Merger Order* ¶ 103.

- "At best, this merger would create a duopoly in areas served by cable; at worst it would create a merger to monopoly in unserved areas. Either result would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands." *Id.*, Statement of Chairmen Powell.

- "By [eliminating line sharing], the Commission has at best provided no incentive for retail DSL Internet access providers to lower prices and at worst provided an incentive for the large providers (i.e., ILECs and cable operators) to increase retail prices." Statements of Chairman Powell Before the Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, U.S. House of Representatives (Feb.26, 2003).

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There Are No Near Term Prospects for Additional "Wires"

- Satellite broadband service is "[c]haracterized by difficult, expensive installations, notoriously poor service, and suspect performance, [so that] the service meant for anyone who can't get cable or DSL has ceased to be a serious option." Brad Grimes, *Ditch Your Dial Up*, PC World (Feb. 27, 2002).
- After the StarBand debacle, the best prospect for satellite competition is Hughes' Spaceway, but even under the most optimistic assumptions, that service is not even scheduled to *begin* until some time in 2004 and, in any event, is focused on businesses.
- The largest holders of fixed wireless licenses are shuttering their doors or have announced that prior roll out plans have been put on hold.
- There are no WiFi or "powerline" services today that would serve as a bypass alternative to the Bells and claims that such services may develop are nothing more than speculation at this point.

Retail Competition Is No Solution

- The Bells argue that even if cable does not today provide a wholesale alternative to the Bells, "retail competition" with cable will give the Bells incentive to grant ISPs access upon reasonable terms and conditions.
- As noted, duopoly competition cannot be relied upon to induce competitive market behavior even in the best of circumstances.
- But duopoly is particularly inadequate, given the Bells' skewed incentives.
  - Cannibalization of existing high margin data services and second line sales.
  - Protection of primary line voice monopolies.

The Bells' Skewed Incentives Are Undeniable

- BellSouth:
  - "[A]dvanced services are increasingly likely to cannibalize the traditional services offered by ILECs. For example, the advent of digital subscriber line ("DSL") technology has applied the brakes on ILECs' "second line" service." BellSouth, NERA Reply Report, CC Docket 01-338, ¶ 167 (July 17, 2002).
  - "DSL deployment brings a number of additional costs . . . . For instance, about 30% of new DSL subscribers give up a second phone line." Harris Reply Dec., Att. 2 (DSL Business Case), CC Docket 01-338, at 3 (July 17, 2002).
- "The Bells . . . Weren't terribly interested [in deploying DSL]. They were making big profits from their control over the country's local phone lines. They also did a lucrative business renting a technology called T-1 lines to businesses that needed fast transmission of computer data." *How Phone Firms Lost to Cable in Consumer Broadband Battle*, WSJ (March 13, 2003).

The *Computer Inquiries* Obligations Provide Substantial Public Interest Benefits

- Unbundling permits multiple parties to provide enhanced services, which results in a "competitive structure" that is more "likely" than a monopoly to "stimul[ate] . . . innovation." *Computer II* ¶ 212 (citing A. Kahn, *The Economics of Regulation* (1971)).
- It has been ISPs (as well as content providers, technology firms and competitive telecommunications carriers), not the Bells, that have been the leaders in developing the technologies and programs that make the "Internet" what it is today. ISPs and others are likewise taking the lead in developing unique broadband services. For example, they are developing distinct features including privacy functions, anti-spam and pop-up ad protections, and remote access.
- Using Bell-provided broadband transport, ISPs can offer retail information services in competition with the Bells, can foster innovation, and can constrain Bell prices.

The Practical Impact Of The *Computer Inquiries* Obligations On The Bells Is Minimal

- There "is currently no prohibition on the bundling of basic telecommunications service and enhanced services at a single, discounted price for any carrier." *2001 Bundling Order* ¶ 39.
- *Computer Inquiries* obligations do not prevent the Bells from offering "innovative" new services. The Bells have not identified a single "innovation" that they have been prevented from deploying. The rules place no constraint on the type of products and services offered by the Bells. Nor do the rules change Bell investment incentives: the Bells benefit regardless of whether the customer chooses Bell-supplied DSL service or DSL service provisioned using broadband transport purchased from the Bells.
- *Computer Inquiries* obligations do not impose substantial administrative costs.
  - Most filing obligations can be done electronically and are web-based.
  - CEI/ONA plans are rarely changed by the Bells.
  - The Commission has upon request granted streamlined tariffing and waived cost support requirements.

Although Core Unbundling Requirements Must Remain, The Commission Should Consider Proposals To Amend More Peripheral Rules

- Commission adjustments to more "peripheral" rules could be warranted upon a showing that they are too costly or unnecessary.
  - One example is to allow the Bells to make their ONA reports available on their websites, rather than through Commission filings.
- The Bells, however, have identified no such rules.
- If there is a real concern with the "administrative costs" of the *Computer Inquires* rules, the burden should be on those seeking elimination of the rules to identify problem rules.

The Bells' Title I "Private Carriage" Theory Must Be Rejected

- The Commission cannot pick a statutory classification to achieve a pre-determined policy result
  - "The Commission is not permitted to look at the consequences of different definitions and then choose the label that comports with its preferred regulatory outcome. . . . The Commission must apply the definition and then accept the regulatory regime that adheres to that classification and that which Congress chose." *Cable Modem Declaratory Order*, Statement of Chairman Powell.
- The Commission has authorized the Bells to offer services on a private carriage basis only in two narrow circumstances: (1) when the Commission determined that the service, despite being tariffed in the past, did not, in fact, comprise or provide telecommunications, and (2) when the Commission determined that a new service should be offered on an individual case basis because it is unique to individual customers and because there is no (or little) general demand for the service.
- Broadband transmission, however, is a *basic transmission service* that is (1) generally demanded and used by large classes of customers, (2) has no generally available substitutes, (3) is used to compete with the Bell's own services, and (4) has always been generally offered on a common carrier basis.